

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20.03.2018

Pronounced on: 09.07.2018

+ **LPA 553/2017, C.M. APPL.29785-29786/2017, 44588/2017 & 45921-45922/2017**

M/S. CHAUHAN ASSOCIATES

..... Appellant

Through: Sh. Hemant Singh and Ms. Seema Singh,
Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Sh. Kirtiman Singh, CGSC with Sh. Prateek
Dhanda, Advocate, for UOI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

%

1. The appellant M/s. Chauhan Associates (hereafter referred as "Chauhan"), an enlisted contractor with the Military Engineering Services (i.e. the respondent, hereafter referred to as "MES") is aggrieved by the impugned judgment of a learned Single Judge which declined to set aside notification, issuing the Work Load Report (hereafter referred to as "the WLR") dated 30th May, 2017. The impugned WLR has the effect of impeding the award of any fresh contract, till a favourable report is prepared by the relevant authorities of the MES.

2. Chauhan is engaged in the business of work contracting; it was enlisted by the MES in 2010. The MES is a department under the control of the Union Ministry of Defence which has been arrayed as second

respondent; first respondent is the Union of India. Chauhan was awarded a contract for ₹ 12,47,04,662/- and a work order in that regard was issued on 05.08.2016. The work order indicated the date of handing/taking over of site of Phase I as 10.08.2016 and Phase II after completion of Phase I. The related date of commencement of the Phases of the contract depended upon the handing over/taking over of the sites. Completion of the work under Phase I was 09.08.2017 and Phase II was 60 months after physical completion of Phase I. It is alleged that MES was unable to handover the site duly on time for Chauhan to commence work and could do so partially on 22.11.2016. Chauhan alleges further that before this event it had sought approval (of MES) for HT and LT Panels, Transformers, LT and HT Cables and other equipments on which it did not take action. It apparently replied much latter, i.e. after six months on 20.03.2017. According to Chauhan, without approval it was not permissible for it to commence work on the even partially provided site. Apart from the delayed handing over of site and delayed approval, the contract specified a single make for supply of sewer pipes; however, the manufacturer mentioned in the contract was not in fact producing the products. These defects, according to Chauhan, were apprised to MES on 08.03.2017. Further, Chauhan alleges that there were numerous other difficulties and the MES adopted a go slow approach and also did not clear pending payments to accelerate the work at the site. In this background, Chauhan alleges that when MES applied for fresh tender for other works in its portal in May, 2017, Chauhan found place in the list of firms not eligible to participate. Chauhan was apprised then that the slow progress of work in the contract was a reason for its listing or debarment; it claims to have represented to MES on 04.06.2017 against the move to bar

award on further contracts. A show cause notice was issued to it, why it ought not to be banned by the MES, on 13.06.2017. Chauhan caused a legal notice to be issued on 21.06.2017. Chauhan attempted to apply for fresh tender in respect of work but was unsuccessful and one application was rejected on 11.07.2017, aggrieved by it approached this Court by filing WP(C) 6244/2017.

3. Before the learned Single Judge MES contended that the actions which Chauhan claimed to be adverse were based upon the departmental circular that dealt with ongoing contract and consequently as the public agency apprising the progress of work, MES was entitled to take an objective view that till the contract performance in respect of the ongoing work is improved fresh contract or work ought not to be awarded. This was accepted by the learned Single Judge who by a short impugned order, rejected the Chauhan's writ petition. The learned Single Judge *inter alia* held as follows:

“5.The notification dated 30.05.2017 is only an intra departmental circular recommending that additional works not be awarded to the petitioner as the petitioner's progress in executing the current contract awarded to the petitioner, is slow. Admittedly, the execution of the works are behind schedule; however the petitioner alleges that the same is not on account of the petitioner but on account of delay on the part of the respondents. This Court is not inclined to examine the question as to who is responsible for the delay in execution of the project. The said question is a disputed question of fact and it is not apposite to examine the same in these proceedings; however, it would be open for the petitioner to make a detailed representation to the respondents and to establish that the petitioner has been working efficiently and has the resources to undertake further works. As stated by Mr. Kirtiman Singh, the respondents would examine the same objectively and with an

open mind and consider removing the negative recommendation against the name of the petitioner in the next review, which is scheduled in the month of September, 2017. If the petitioner is aggrieved by this decision, it would be open for the petitioner to take such steps as available in law.”

4. Chauhan contends that the learned Single Judge failed to take into consideration that the ban imposed, i.e. of barring it from participating in further tenders was in violation of the principles of natural justice and furthermore that the WRL is not merely an intra-departmental notification but in fact makes it an adverse one and has grave financial impact on it. It is urged on behalf of Chauhan that the impugned judgment entirely overlooks the reasons behind the delay in execution of the work and that the WLR is one sided partisan view. In this regard the procedure adopted in the impugned WLR was known and even the representation given has not yet been considered. Learned counsel for Chauhan relied upon *Offshore Infrastructure Limited Vs. Indian Oil Corporation Limited* [WP(C) 11043/2017, decided on 26.02.2018] to say that the action of the MES amounted to adopting an utterly unfair procedure. It was submitted that the guidelines or the intra-departmental circular which outlines the manner of apprising the ongoing work was never made known and in the absence of objectively disclosed criteria the one sided approach accepted by the MES in drawing the impugned WLR was arbitrary.

5. Since the writ petition was rejected even without counter affidavit, this Court is of the opinion that formal reply was necessary. Consequently the MES filed its reply in this appeal on 29.11.2017. Pursuant to directions of the Court it also filed an additional affidavit subsequently on 13.03.2018. The position of the MES is that right from inception at the stage of

enlistment Chauhan was made aware that it could be removed or blacklisted or the MES could decide not to issue tender form in any particular case and suspended from the list of contractors. The concerned extract of the letter of enlistment issued to Chauhan on 16.08.2010 is reproduced below:

“Please note that MES authority has the right as he may decide, not to issue tender form in any particular case and also to suspend, remove or blacklist from the MES list of contractors, in the event of submission of non-bonafide tenders or technical or other delinquency in regard to which the decision of the appropriate MES Authority shall be final and conclusive.”

6. MES argued about its reliance on an algorithm for scheduling a set of project activities known as Critical Path Method (hereafter ‘CPM’). The CPM is a step-by-step project management technique for process planning that defines critical and non-critical tasks with the goal of preventing time-frame problem and process bottlenecks. It is urged that the object of the impugned WLR is directly correlated with the CPM submitted by the contractor. In the CPM the contractor estimates the completion of components of work. It is stated that the WLR is prepared by MES by comparing the CPM targets set by the contractor in consultation with its officials and the actual targets achieved and therefore is based upon objective appraisal.

7. Counsel for respondent points out that the CPM furnished by Chauhan on 01.11.2016 did not cover all activities as no critical paths were indicated. He also points to the review meeting of 18.04.2017 wherein various project milestones were revised and confirmed with Chauhan. A copy of the letter dated 05.06.2017 in this regard has been produced along with the counter

affidavit. MES also refers to a coordination meeting 11.07.2017 in which Chauhan agreed to submit a revised targets by 09.08.2017. However, it merely indicated the target dates of Sub-Station 1 and 2 as on 30.11.2017 and 20.12.2017 and not the *inter alia* project.

8. MES has thereafter extracted a tabular statement in respect of six main works and several other works to say that Chauhan consistently missed its deadlines and after 15 months (as against the completion period of 12 months) the progress achieved was only 35%. MES further pointed out that the tender which led to the issuance of work order of Chauhan itself contains the stipulation which *inter alia* read as follows:

“Opening of price bid (cover No.2) will be decided by the Accepting Officer based on eligibility criteria specified here-in-below and other considerations such as past track record, financial position and experience of similar works executed by the application/contractor etc.”

Likewise it is stated that the recent tender floated by the MES indicates by note past track record would be relevant consideration.

9. In the additional affidavit MES has stated that the period of delay attributable to it or on account of its inaction have been taken into account while drawing the impugned WLR and, therefore, its action was justified. In this regard the MES has set out the details of delay attributed to either parties and alleged that there has been unacceptable slow progress of work which justified the impugned WLR. It is stated that Chauhan was lagging behind, in schedule, 7 activities out of 8 by end March, 2017 after taking into account the delay on the part of the Department and unavoidable circumstances beyond the contractor's control but likewise the revised schedule-II out of 36 activities the Chauhan was lagging in 35 activities. It

was submitted that, therefore, taking into account all these factors the WLR issued and impugned by Chauhan was correctly not justified. It was also stated that the allegation with respect to WLR constituting blacklisting is unsubstantiated because unlike debarring or plain order of blacklisting which have definite adverse consequence the mere issuance of WLR which prevents award of fresh work until the contract awarding agency is satisfied about the progress of the work and the efficiency of its implementation, cannot be considered per se as an adverse order. Such WLR merely are meant to promote efficiency in contract implementation and to ensure transparency and accountability.

10. The narrow question which this court has to address itself to is whether the procedure adopted to issue the impugned WLR and the attendant bar placed on Chauhan was unfair and arbitrary.

11. It has been previously held by the Supreme Court that previous performance of a bidder in other contracts can be a relevant factor; to that extent the contention of MES argument is justified. A state agency or corporation, as the user of goods or services, is entitled to appraise itself of the track record of the supplier or service provider- be it in past dealings with itself or with other agencies. This was recognized in *Patna Regional Development Authority and others vs. M/s. Rashtriya Pariyojana Nirman Nigam & others* 1996 (3) SCC 529. The only question, therefore, is whether the procedure adopted in this case for preparing the appraisal or past performance report was unfair or contrary to guidelines.

12. Judicial review, concerning award of public contracts, is limited and is confined to decision-making processes. However, when the courts do exercise such jurisdiction, they consider not the merits of the decision, (i.e

the value judgment about the relative merit of the rival bidders, which is left to the exclusive judgment of the administrative or executive agency or department) but whether the *process* of decision making was either illegal, or procedurally irregular, unfair, lacking in *bona fides*, or the decision so unreasonable that no reasonable man placed in a like situation would have made such decision. In *Southern Painters v. Fertilizers and Chemicals Travancore Ltd.* AIR 1994 SC 1277 the Supreme Court highlighted the importance of following fair procedure:

"9. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after the compliance of the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court, was not justified in dismissing the writ petition."

13. This decision was followed by a judgment of the Division Bench of this court in *Everest Enterprises vs. NTPC and Ors* (101) 2002 DLT49). More recently, in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, after reviewing a number of its previous decisions, the Supreme Court noted:

"Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance

with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

14. That seminal authority, *Tata Cellular v. Union of India*, (1994) 6 SCC 651, noted that in relation to public contracts and tenders, the following principles are discernible from the previous precedents:

"1) The modern trend points to judicial restraint in administrative action.

2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

15. Usually, therefore, courts accept executive judgments in regard to public activities that involve award of contracts. The public authorities have freedom of contract and even if the Court finds some infirmity in the decision making process, unless there is illegality, patent arbitrariness, unreasonableness or malafides evident on the face of the record, the Court should in the larger public interest, not interfere with the process. However, the distinctive feature, which highlights a decision that cannot and should not be interfered with, from one calling for interference is when it is established that the award or denial of contract was based on unfair consideration or unfair procedure.

16. The record in this case, shows that the condition, which Chauhan was informed at the stage of formation of contract, was that related to acceptance or rejection of tender, i.e discretion to MES *"...to suspend, remove or blacklist from the MES list of contractors, in the event of submission of non-bonafide tenders or technical or other delinquency.."* This did not amount to informing Chauhan that its *conduct in regard to the performance of the contract* would be watched, and more importantly, the parameters for judging such performance and other attendant details such as redress mechanisms (review, appeal etc) or the time frame within which the review or appellate decision could be taken. This omission is significant, because the manner in which the appraisal (through the WLR) has been done, and the consequence is such that there is no definitive time for the adverse order, in terms of the time period. In the case of a known adverse order, such as

blacklisting or suspension (from consideration or from award of contract) the period is known. However, though ostensibly “low-intensity” the WLR has an indefinite life. If one keeps in mind the fact that Chauhan is an enlisted contractor (which implies that it has the basic competence to enter into contracts on a regular basis with the agency, i.e. the MES) an indefinitely timed WLR can spell grave economic consequences.

17. MES has relied on the Critical Path Method (CPM) to say that such process was deployed, based on the inputs of the contractor and the time frames set by it, compared to the actual progress, to ultimately issue the WLR. However, given that this court cannot in judicial review carry out a merits review, the complete absence of any objective criteria to evaluate the relative importance in terms of the sequence of works and the value given to each at different stages as offset by the nature of delays on the part of MES leads this court to conclude that the authorities and officials of MES can well evaluate work of different contractors, based on different set of criteria. In others words, the MES should not only frame *objective norms for evaluation of work and its review*, but award marks, having regard to the relative importance of multitudinous tasks, given the sequencing of tasks in the contract and their relative relevance at different points of time, in the background of its own inadequacies (for which again objective norms or marks should be allocable). In addition, speedy efficacious review or appellate mechanisms should be notified, to ensure that such WLRs are considered on merits and minimum adverse impact is felt. Such norms should be in the form of circulars and notified to the agency or contractor awarded the work or contract. If these steps are not followed, adverse WLRs would in effect be debarring orders without a definite time period.

18. In the light of the above analysis and conclusions, MES is hereby directed to frame appropriate set of norms for award of marks or values, for ongoing work, with speedy and efficacious mechanisms of appeal. In the meanwhile, Chauhan's grievances shall be suitably addressed by the existing review mechanism, which shall consider the work performed afresh within six weeks and pass necessary orders. The appeal is allowed in these terms. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 09, 2018

नित्यमेव जयते